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No. .....

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In the Supreme Court of the United States

October Term, 1980

FRANK J. PROCHASKA,
Petitioner,

vs.

FRANCIS H. MARCOUX,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is the *de minimis* doctrine applicable to cases involving violation of constitutional rights?

2. What standards are to be applied in awarding attorney fees to a successful defendant under the Civil Rights Attorney's Fees Awards Act of 1976? Title 42, United States Code, § 1988.

3. Is the random stop prohibition defined in *Delaware v. Prouse*, 440 U.S. 648 (1979) equally applicable to a motor boat, and if so, did the trial court err in granting Respondent's motion for summary judgment under the facts presented by this case?

4. Is the denial of oral argument on appeal to one party a denial of due process?

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In the Supreme Court of the United States

October Term, 1980

FRANK J. PROCHASKA,
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vs.

FRANCIS H. MARCOUX,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Frank J. Prochaska ("Prochaska"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on September 9, 1980.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported in 632 F.2d 648 (10th Cir. 1980), and appears in Appendix C.

JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Tenth Circuit on September 9, 1980. A timely Petition for a Rehearing and Suggestion for Hearing en Banc were denied on November 10, 1980. Appendix D. The jurisdiction of the Court is invoked pursuant to Title 11, United States Code, § 2101(c).

STATUTES

Title 28, United States Code, § 1983:

Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Civil Rights Attorneys Fee Award Act of 1976, Title 42, United States Code, § 1988:

Proceedings in vindication of civil rights * * *

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1982, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal

Revenue Code [26 USCS §§ 1 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

This action was filed July 3, 1978, seeking both compensatory and exemplary damages for violation of Prochaska's civil rights under Title 28, United States Code, § 1983. Prochaska's claim arose out of the action of Respondent ("Marcoux"), a Wild Life Conservation officer of the Colorado Division of Wild Life. Prochaska alleged that on June 28, 1976, he was lawfully operating his motor boat while fishing on Lake Estes in Estes Park, Colorado. It was the only boat on the lake. Marcoux, while engaged in the performance of his duties, randomly intercepted Prochaska by use of another boat, drew both boats together, directed Prochaska to draw in his fishing line, started peering into the boat looking for various items required by law to be part of a motor boat's equipment, such as fire extinguishers, a sounding device, paddle, and life jacket, and interrogated him with respect thereto. Not finding a fire extinguisher, Marcoux directed Prochaska to the dock and proceeded to write a citation charging Prochaska with operating a vessel without proper equipment. Prochaska was asked to sign a citation, but he refused because of the generality of the charge. Whereupon, he was placed under arrest, and advised he would have to accompany Marcoux to the police station. Prochaska then signed the citation, and was permitted to leave.

On July 2, 1976, Prochaska appeared in the local county court and was handed another citation by Marcoux charging Prochaska with operating a vessel without a

proper and valid registration. However, Marcoux was caught by surprise when Prochaska produced a temporary permit which was effective on the date Prochaska was arrested. Marcoux was forced to withdraw the charge. Subsequently, Prochaska was found guilty of the first charge.

Prochaska alleged and testified by deposition that Marcoux acted with malice and without probable cause; that his activities were conducted in an abusive and arrogant manner with the intent of harassing, humiliating, and degrading Prochaska, and that he had been deprived of his right to be secure in his person against unreasonable search and seizure under the First and Fourteenth Amendments to the Constitution of the United States.

Marcoux admitted that the boat was the only vessel on the lake, and was positioned approximately 300 yards away from him, but claimed that by using his binoculars he could see the boat lacked a registration sticker. The sticker is 3 inches by 3 inches in size. However, at no time while searching Prochaska's boat did Marcoux mention the sticker, look for it, or charge Prochaska that day for the violation. He later claimed that he had called his department and was told by some unknown person that there was no record of a Prochaska registration. He did not contact Prochaska prior to issuing the second citation although Prochaska lived in the community. Marcoux testified in his deposition that under departmental rules he may make a boat contact at any time, and there need not be any reason for the contact. According to Marcoux, whenever he saw a boat, he could go out and search it without probable cause. On the basis of the depositions of Prochaska and Marcoux, the trial court granted summary judgment and denied Marcoux's motion for attorney fees finding specifically that Prochaska's action was not frivolous, unreasonable, or without foundation. Appendix B.

The Court of Appeals for the Tenth Circuit affirmed, but reversed the trial judge on the cross-appeal of Marcoux relating to the denial of attorney fees. One judge dissented (Judge Doyle), pointing out that while the case was not one of great moment, it was not the weakest case to ever come before him, and that the matter of attorney fees was properly for the trial court to determine. He deplored the appellate court "refinding" the facts, and stated that the award was out of line with the decisions of the Tenth Circuit. Marcoux has filed a claim for $2,587.45 plus court costs.[1] The Court of Appeals has recalled its mandate and stayed all further proceedings pending final disposition by the Supreme Court.

ARGUMENT

A. The Lower Court Is Erroneously Applying the De Minimis Doctrine to Civil Rights Cases.

The Tenth Circuit appears to be alone in its intractable position that an individual's constitutional rights can be weighed quantitatively, and if a violation occurs, it may not be grounds for an action if it falls short of some undefined standard of circumstances. In *Wells v. Ward*, 470 F.2d 1185 (1972), where the plaintiff freely chose custody rather than sign a ticket, the court adopted its position that Congress, in enacting § 1983, had in mind the "aggravated lawless conduct which then obtained." *Id.* at 1188. While the Court of Appeals recognizes that the present Act contemplates a broader range of invasions, it still must constitute a deprivation of a right guaranteed by the Constitution. Thus, the court equates an invasion of § 1983 rights with aggravated conduct. E.g. *Allred v. Svarczkopf*, 573 F.2d 1146 (10th Cir. 1978); *Atkins v. Lan-*

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1. The trial court's order granting summary judgment was entered on February 21, 1979. *Delaware v. Prouse, supra,* was decided on March 27, 1979.

ning, 556 F.2d 485 (10th Cir. 1977); *Freeman v. Flake,* 448 F.2d 258 (10th Cir. 1971). In *Draeger v. Grand Central, Inc.,* 504 F.2d 142 (10th Cir. 1974), the court displayed its adherence to what may be referred to as the *de minimis* doctrine by finding a § 1983 violation when the facts established a false arrest, search, confinement, and a "roughing up" of the plaintiff.

The Tenth Circuit view is not shared by other circuits and should be struck down for the reason that the whole fabric of civil rights litigation is now in jeopardy. By finding this action "frivolous, unreasonable, or groundless", the court is merely voicing its continued adherence to the *de minimis* rule which in turn would lead to more awards of attorney fees to defendants, and would have a chilling effect on potential plaintiffs with complaints bottomed on § 1983 invasions. Furthermore, as will be briefly alluded to later, the court ignored factual issues which should have resulted in a denial of Marcoux's motion for summary judgment. Even then, Prochaska would be faced with the potential loss of his case because it may not be serious enough to avoid the thrust of *de minimis.*

Other courts have refused to classify invasions of constitutional rights as actionable or not actionable depending on the seriousness of the violation. In *Pritchard v. Perry,* 508 F.2d 423 (4th Cir. 1975), the court rejected the *de minimis* rule pointing out that there is no warrant for any separation of constitutional rights into redressable rights or non-redressable rights, or of major or minor constitutional deprivations.[2] E.g. *Pierson v. Ray,* 386 U.S. 547

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2. The court quoted the following from *Monroe v. Pape,* 365 U.S. 167, 180 (1961) which in turn quoted from Congressional debates: "The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; there may be what lawyers call merely nominal damages; and yet by this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the States."

(1967) (warrantless arrest without probable cause); *Joseph v. Rowlen,* 482 F.2d 365, 369 (7th Cir. 1968) (officer's conduct may not be flagrant or malevolent); *Hoyt v. Rockford,* 592 F.2d 381 (7th Cir. 1979) (no violence necessary); *Giordano v. Lee,* 434 F.2d 1277 (8th Cir. 1970) cert. den., 403 U.S. 931 (1971).

It appears clear that the court's philosophy in this case is permeated with the *de minimis* doctrine. Therefore, this Court should define whether or not the rule is appropriate within the context of civil rights cases before it catches on in other circuits deluged with civil rights actions. Undoubtedly, if this case receives judicial gloss, there will be a serious temptation on the part of many courts to adopt the rule in order to clear their dockets. This would not be consistent with the intent of Congress, or with the prevailing view, and will result in an increase of awards against unsuccessful plaintiffs.

B. Awards for Attorney Fees Should Be Rarely Made to Successful Defendants in Civil Rights Actions, Should Be Based on Bad Faith, and Left to the Discretion of the District Courts.

Decisions to grant or deny such awards should be left to the discretion of the district courts.

The question of attorney fees was only mentioned in passing in Prochaska's reply brief, because it seemed clear that the trial court's denial, while exercising his discretion, was final.

In the recent case of *Hughes v. Rowe,* ..... U.S. ....., 66 L.Ed.2d 163 (decided November 10, 1980), the Court said:

> The decision whether to award attorney fees under 42 USC § 1988 * * * is committed to the discretion of the district courts, who are intimately familiar with the course of the litigation. *Id.* 178.

While Marcoux vigorously argued the *de minimis* rule in his brief, he did not say one word about the denial of attorney fees, nor did he make any complaint.

The trial court specifically found that this action was not frivolous, unreasonable, or without foundation. Appendix B. However, the majority of the lower court, working only from two depositions, the briefs of the parties, and statements of the trial court, and without hearing Prochaska's counsel during oral argument,[3] held that the action was "clearly frivolous, unreasonable, or groundless." Indeed, not only did the majority of the court overturn what appears to be a discretionary matter lying within the district court's grant of power by the Congress, but second-guessed it on the question of whether the case was so frivolous, unreasonable, or groundless, so as to warrant an award of attorney fees to a defendant under the Civil Rights Attorney's Fee Award Act of 1976.

While Prochaska disagrees with Judge Doyle's statement in dissent that the case was "much ado about nothing", since it is urged that violations of constitutional rights are not measurable quantitatively,[4] his concern that the question of attorney fees was for the trial court to determine appears sound. Judge Doyle also said: "If the case is to be considered frivolous based on the length of the chancellor's foot, so to speak, the results are going to be unfortunate."

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3. See *infra*.

4. *Pritchard v. Perry*, *supra*. The trial judge appears to agree with this statement when he said: "Now, I want to emphasize that by my saying I am not following the trivial or inconsequential line of cases, that by holding that I do not criticize the Tenth Circuit in what it holds in that case.

"I am not holding my decision to grant summary judgment on that basis, because I don't know how one measures the significance of the Fourth Amendment violation. I can't."

The possibility of a court re-evaluating the merits of their case as they viewed it at its inception, but after all the evidence is in, and then holding that the case should not have been brought in the first place, would discourage all but the strong-hearted. In this regard, the following observation from *Isaacs v. Temple University,* 467 F.Supp. 67 (E.D. Penn. 1979), is particularly apropos:

> The right of freedom of speech is not to be so chilled by official action. The doors to federal courthouses must be made open to all who have justiciable federal causes of action. They must remain open not only to the rich and the poor, but also to multitudes in between who do not qualify for publicly supported legal aid, and who can afford the ever-increasing cost of legal services only by great personal sacrifice. To impose upon plaintiffs the customarily not-immodest claims of their opponents for counsel fees as a penalty for failing to convince the fact finder by a preponderance of the evidence, would, in my estimation, effectively barricade the courthouse doors to all middle-income civil rights plaintiffs except those with the most reckless gambling natures. (467 F.Supp. at 70.)

The history of the 1976 Act bolsters the reasoning in *Isaacs.* After the Supreme Court denied attorney fees to the prevailing plaintiffs in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975), a movement began in Congress to blunt the impact of this decision. Hearings on legal fees eventually culminated in an amendment to 42 U.S.C. § 1988, which allowed an award of attorney fees to prevailing parties. However, it is evident from the legislative history of the Act that Congress was mostly concerned with prevailing plaintiffs, and that only in extreme cases should an award be given to a winning defendant. In other words, the "private attorneys general"

doctrine was their main concern. The following from Senate Report 94-1011 appears appropriate here:

> The purpose and effect of S. 2278 are simple—it is designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866. * * * All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.
>
> In many cases arising out of our civil rights laws, the citizen, who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court. (1976, U. S. Code Cong. and Admin. News, pp. 5909, 5910.)

At page 5912, the report mentions the criterion for awarding attorney fees to a successful defendant as follows:

> Such a party, if unsuccessful, could be assessed his opponent's fee only where it is shown that the suit was *clearly* frivolous, vexatious, or brought for harassment purposes. * * * This bill thus deters frivolous suits by authorizing an award of attorney's fees against a party shown to have litigated in "*bad faith*" under the guise of attempting to enforce the Federal rights created by the statutes listed in S. 2278. (Emphasis supplied.)

It appears all too clear that Congress was more concerned with the private attorneys general than with the defendants. Attorney fees are to be awarded prevailing plaintiffs unless special circumstances militate against such an award, but as to defendants, much more stringent circumstances must be present.

The senate debates were also geared toward the prevailing plaintiff. Senator Hugh Scott said: "I believe it (S. 2278) ranks among the important measures we will act upon this year. Simply stated, S. 2278 is designed principally to award attorney fees to prevailing plaintiffs in civil rights cases." (Cong. Rec. Vol. 122, September 21, 1976, at p. 31471.) On that same day Senator Mathias observed in debate: "Mr. President, I believe that it is incumbent upon Congress to do its part to insure the proper enforcement of our civil rights laws. By providing for reasonable counsel fees to prevailing parties in civil rights cases, the Congress can take a great step in the direction of minimizing the formidable barrier erected by the Court's decision." *Alyeska Pipeline Service Co. v. Wilderness Society, supra. Id.* at 31471.

On that same day Senator Kennedy argued: "Fee shifting provides a mechanism which can give full effect to our civil rights laws at no added cost to the government. *Id.* at 31472.

In passing, and apropos the "much ado about nothing" statement of Judge Doyle, Senator Allen pointed out in offering the bill that "there are no minor civil rights." *Id.* at 31475.

Fees have rarely been awarded prevailing defendants, but when they have, the courts have been cautious. In *Carrion v. Yeshiva University*, 535 F.2d 722 (2nd Cir.), the court upheld a fee award to a successful defendant,

but stated that such awards should not be made routinely, or simply because defendant succeeds, but only when the action brought is found to be unreasonable, frivolous, meritless, or vexatious. *Cf. Bowers v. Kraft Food Co.*, 606 F.2d 816 (8th Cir. 1979), a race discrimination case. An award of attorney fees to the defendant was reversed upon the holding that although the evidence was weak, it was sufficient to "conceivably" have influenced plaintiff to believe she had a stronger case. In the case at bar, counsel would certainly have argued to the court that Prochaska would not have pursued this matter as far as he did, and is still pursuing it, if he did not feel he had a strong case, and that he had been maltreated by Marcoux.

Rare examples of awarding fees to a defendant are *Koon v. Metts*, 472 F.Supp. 897 (D.C. Car. 1978) and *Patzkowski v. United States*, 576 F.2d 134 (8th Cir. 1978). These were extreme cases. In *Koon*, a civil rights action was brought by a preacher and a member of the South Carolina legislature against, among others, the county sheriff, because the plaintiff, while emptying trash at one of the litter stations in the county, was apprehended by a deputy sheriff for depositing the wrong kind of trash. The evidence showed that the matter was strictly one of political expediency, and under such circumstances, the prevailing defendants were awarded attorney fees. The court found that the case was brought for vexatious or harassment purposes. It is noted that this award was made by the district court which, we submit, is the only court that has been granted this power by the Congress. Its discretion should be final unless grossly abused. The evidence in the case at bar did not sustain such a finding.

In *Patzkowski*, a suit was brought by a taxpayer for the refund of employment taxes. The government coun-

terclaimed for the balance of the assessment and filed a third party complaint seeking to collect the same penalty assessed. The taxpayer prevailed on the counterclaim, but was denied attorney fees. He had sought such fees under the Civil Rights Attorney's Fees Awards Act of 1976, *supra*. The Court of Appeals reversed for the reason that the district court had applied the wrong test: that of bad faith.[5] The appellate court held that attorney fees may be allowed in this case when there was a showing that the government's action was frivolous, harassing, vexatious, unreasonable, without foundation or was instituted in bad faith. The district court erred in limiting the test to bad faith only. This is the only published case we have found where a court of appeals reversed a district court on the question of awarding attorney fees to a prevailing defendant, and it was done so on the narrow ground that the court applied the wrong test.

The lower court refers to *Christianburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978), for the proposition that a *district court* (emphasis supplied) may, in its discretion, award attorney fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was "frivolous, unreasonable, or without foundation." *Christianburg* does not answer the question we pose: Why does the court reverse here when the district court has already exercised that discretion against the granting of an award for attorney fees to the prevailing defendant? However, more was said in *Christianburg*:

> In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, be-

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5. But see Senate Report 94-1011, p. 5912, *supra*, where the element of "bad faith" is emphasized.

> cause a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appears questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit. *Id.* 421, 422.

We have found no other published opinion wherein a court of appeals reversed a district court's finding that a prevailing defendant was not entitled to attorney fees because plaintiff's action was, in the opinion of the district court, not unreasonably brought, not frivolous, not without foundation, or not unreasonable.[6] The lower court is chartering a new course which not only erodes the discretionary and fact-finding powers of a district court, but gives itself powers in an area not contemplated by Congress when the Civil Rights Attorney's Fee Awards Act was enacted.

To emphasize what some courts are doing, we point to *Green v. Ten Eyck*, 572 F.2d 1233 (8th Cir. 1978), where the contention was made that the same standards should apply in awarding attorney fees to a plaintiff or a defendant. The court awarded attorney fees to the plaintiff who prevailed on appeal, but made no effort to define a stan-

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6. However, the Tenth Circuit in *Morgan v. Brittany*, No. 79-1230 (unpublished), reversed a denial of an award to a defendant because the district court "made no effort to determine whether the lawsuit was frivolous, unreasonable or without foundation."

dard on remand for further proceedings. E.g. *Ryals v. Azalea City Racing Club, Inc.*, 443 F.Supp. 146 (D.C. Ala. 1977), where the court awarded attorney fees to a plaintiff, but did not delineate what standards it was applying.

Finally, in *Hughes v. Rowe*, ... U.S. ....., *supra*, an award of attorney fees against an unsuccessful prisoner-plaintiff was vacated on the authority of *Christianburg Garment Co. v. Equal Employment Opportunity Commission, supra*, which laid down the rule that the defendant in an action brought under Title VII of the Civil Rights Act of 1964, may recover from the plaintiff only if the district court finds "that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.* at 421. Although recognizing that a different standard might be applied in a § 1983 action, the Court could perceive no reason for applying less stringent standards. It was pointed out that the plaintiff's action must be meritless in the sense that it is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees. The court then quoted from *Christianburg*:

> To take the further step of assessing attorney fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII. Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so. *Id.* at 422.

Is this the standard to be applied in all future § 1983 cases? If so, it is submitted that the standard is not as

stringent as intended by Congress. The question of whether an action is brought in bad faith should be the controlling criterion. Senate Report 94-1101, *supra*, at page 5912, makes this clear when it states:

> Such a party, if unsuccessful, could be assessed his opponent's fee only where it is shown that his suit was clearly frivolous, vexatious, or brought for harassment purposes. * * * This bill thus deters frivolous suits by authorizing an award of attorneys' fees against a party shown to have litigated in *"bad faith"* under the guise of attempting to enforce the Federal rights created by the statutes listed in S. 2278. (Emphasis supplied.)

It is suggested that in spite of the various characterizations used, the ultimate result intended by Congress was the standard of "bad faith".

There would be a far less chilling effect on potential § 1983 plaintiffs if they were aware that attorney fees would be awarded against them only if it was established that an action was brought in bad faith. *Koon v. Metz*, *supra*. An act being labeled "frivolous" appears to echo the *de minimis* rule, and should be discarded as quantitatively measuring invasions of constitutional rights, which should be impermissible. Being "without foundation" is often a judgment call by counsel, and would most certainly have a chilling effect on bringing a close case in the first place. "Unreasonable" falls in the same category. "Harassment" as used in the Senate Report can be applied to many types of cases. If a plaintiff has suffered an invasion of his civil rights, he may choose not to file an action at all because it may be a petty invasion, or if he does sue, he may choose one of several potential defendants. One can label this action harassment. It is submitted that the bad faith standard be adopted as more

clearly reflecting the intent of Congress, proof thereof being made by reference to the surrounding circumstances. Any trial attorney will attest that what appears to have been a good case can, by the reluctance of witnesses to testify, by the death or disappearance of witnesses or documentation, by friendly witnesses suddenly turning hostile, and by any number of factors, literally fall apart, and what was once at least a decent case, if not a strong one, will appear to have been brought vexatiously, without foundation, or for the purpose of harassment.

Therefore, it is urged that the Court adopt a clear standard for the award of attorney fees to a successful defendant based on the concept of bad faith. Only then can the weak-hearted gather the courage to vindicate a § 1983 wrong.[7]

C. Random Stop Prohibition Relating to Automobiles As Defined in Delaware v. Prouse, 440 U.S. 648 (1979), Applies Equally to Motor Boats and Other Vessels.

In *Prouse*, a patrolman stopped the automobile occupied by the respondent in that case, and smelled marijuana smoke as he was approaching the vehicle. He saw marijuana in plain view on the car floor. The respondent was subsequently indicted for illegal possession of a controlled substance. A motion to suppress was filed and granted. The Delaware Supreme Court affirmed, and upon certiorari, this Court also affirmed.

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7. This would avoid decisions such as *Goff v. Texas Instruments, Inc.*, 429 F.Supp. 1973 (D.C. Texas 1977), where the court, in awarding attorney fees to a successful defendant, was of the opinion that the prevailing defendant should recover under less egregious circumstances than the traditional bad faith or harassment required by the common law. The standard to be applied to defendants' recovery should be more liberal than bad faith.

The Court held that unless there is at least articulable and reasonable suspicion that a motorist is unlicensed, or that an automobile is unregistered, or that either the vehicle or the occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile is unreasonable under the Fourth Amendment. Such stopping of an automobile and detaining its occupants constitutes a seizure within the Fourth and Fourteenth Amendments even though the purpose of the stop is limited, and the resulting detention is quite brief.

No material differences are perceived between the random stopping of an automobile travelling along the public highway and a motor boat being operated on a public lake. All the safeguards afforded by *Prouse*, and the reasons therefor, are clearly applicable to Prochaska. When he stepped into his motor boat, moved out into the lake, and started trolling, he had as much right to an expectation of privacy, and protection from the unbridled discretion of government officials, as did the driver of the automobile in *Prouse*.

Marcoux freely admitted that the Colorado Division of Wild Life had no standards, guidelines, or procedures pertaining to document and equipment spot checks. He pointed out that he always conducted such random checks for fishing licenses and registration stickers, and while doing so, investigated by questioning whether the boats were equipped as required by law. It appears beyond argument that the stopping of the boat, drawing the boats together, the interrogation of Prochaska, and peering into the boat for equipment, and which resulted in a warrantless arrest, brings this case within the reach of *Prouse*. See also *Brown v. Texas*, 443 U.S. 47 (1979) (random stopping of pedestrian), and *Torres v. Puerto Rico*, 442

U.S. 465 (1979) (random searching of airline passengers' baggage).

Closely analogous to the case at bar is *United States v. Piner,* 608 F.2d 358 (9th Cir. 1979), where the court held that a random stop and boarding of a vessel by the Coast Guard after dark for safety and registration inspection without cause to suspect non-compliance was not justified by governmental need to enforce compliance with safety regulations and constituted a violation of the Fourth Amendment. The court rejected the government's argument that random stops are the only practical means of ascertaining whether pleasure craft complied with safety regulations.

In the case at bar, Marcoux claimed he could see that the boat did not have a 1976 registration sticker. He claimed he went out on the lake for the express purpose of checking Prochaska's registration. However, after contact was made, nothing was said about the registration, and the boat was searched for items required by safety regulations. The question of a registration sticker was not brought up until Prochaska was arrested when he appeared in court to answer other charges. The analogy between the case at bar and *Piner* is beyond argument.

Insofar as Marcoux claiming that he stopped the boat because he could not see a registration sticker at such a great distance, and having completely forgotten about it, searched the boat instead, is a credibility question for the jury to decide. Credibility is also raised in connection with Marcoux's claim that he had called his office and ascertained that Prochaska had no registration sticker. The officer's good faith, his real purpose for intercepting Prochaska, whether he had actually checked out the existence of a sticker, whether an argument on the dock resulted in the malicious filing of a second clearly un-

substantiated charge, were questions of fact for the jury. The circuit court appears to complain about the failure of Prochaska to file affidavits and a brief in the trial court. Neither party filed a brief. Counsel are at a complete loss as to how this would have affected the common-sense approach that credibility and good faith cannot be determined by affidavits and the filing of briefs under the circumstances of this case. All Prochaska would be swearing to would be that Marcoux could not tell whether or not he had a sticker on the boat, that he doubted that Marcoux had checked with his department, that the second charge was the result of malice, etc. These are matters to be developed at the trial. There is nothing that could be added by an affidavit. Even the trial court agreed on this point by not asking for briefs, and hearing oral argument. Therefore, it appears clear that this case was not to be decided on the summary judgment motion, but should have been presented to the jury whose function is to judge the credibility of witnesses by their demeanor on the witness stand, and in the light of all the surrounding circumstances.

We submit that *Prouse*, *Brown*, and *Piner* are clear and dispositive of Prochaska's right to bring this § 1983 case.

D. The Denial of Oral Argument on Appeal to One Party Is a Denial of Due Process.

It is conceded that the right to present oral argument on an appeal such as this is not always a violation of due process. In order to expedite their dockets, courts of appeal have promulgated rules targeted at dispensing with argument in certain classes of cases. (See Rules of Court, Court of Appeals for the Tenth Circuit, Appendix E.) *George W. Bennett Bryson & Co., Ltd. v. Norton Lilly & Co., Inc.*, 502 F.2d 1045, 1050 (5th Cir. 1974).

In *Communications Comm'n v. WJR,* 337 U.S. 265 at 275 (1948), the Court said:

> On the contrary, due process of law has never been a term of fixed and invariable content. This is as true with reference to oral argument as with respect to other elements of procedural due process. For this Court has held in some situations that such argument is essential to a fair hearing. *Londoner v. Denver,* 210 U.S. 373, and others that argument submitted in writing is sufficient. *Morgan v. United States,* 298 U.S. 468, 481.

However, no case or rule has been found where, as here, one party is permitted to make a unilateral argument when opposing counsel was unable to attend because of a dire emergency, and had so advised the court. The facts are these: Undersigned counsel was called to Chicago, Illinois, because of the sudden death of his mother, and was unable to return in time for the oral argument set for July 8, 1980. On July 7, 1980, a continuance on the oral argument was requested by telephone by reason of an exceptional emergency. (See attached affidavit, Appendix F.) However, the court proceeded with the argument, and in its opinion designated undersigned counsel as "being excused from oral argument". Counsel had never asked to be excused, had never requested that argument be waived, and was of the reasonable opinion that oral argument would be continued to a later date. Instead, he received a copy of the slip opinion of the court on September 10, 1980. It was extremely important, particularly because of the attorney fees award, that counsel be present to present his position, answer questions, and perhaps add something to the court's store of knowledge relating to the subject. As it stands at the present time, counsel has been unable to satisfactorily explain

to Prochaska why he was not present, and why the court proceeded without him. Even a lay person understands that argument on the part of one side only is extremely disadvantageous to the absent party. This statement is particularly appropriate here where Marcoux never took the time to brief the question of an award of attorney fees, apparently believing that the district judge's order was final. It was vital that Prochaska's counsel be given a chance to present oral argument because the issues are extremely important in view of what appears to be new precedent in the field of civil rights.

As the Court well knows, the importance of oral argument can never be overestimated. Justice Felix Frankfurter once wrote:

> He respected the traditions of the Supreme Court as a tribunal not designed as a dozing audience for the reading of soliloquies but as a questioning body, utilizing oral arguments as a means for exposing the difficulties of a case with a view of meeting them. *Of Law and Men* (Stanley M. Silverberg) 321 (1956).

One can only speculate as to what may have happened if counsel would have been able to present his position on *de minimis*, attorney fees, and analogize this case with *Prouse*, *Brown*, and *Piner*. It is submitted that under these circumstances, proceeding with unilateral argument to the exclusion of counsel for one side constituted a failure of due process.

CONCLUSION

It is submitted that the Court should exercise its powers of supervision and summarily reverse the lower courts on the authority of *Prouse*, *Brown*, and *Piner*. The case should be submitted to a jury. However, clear statements of policy are necessary in order that the Civil Rights Attorney's Fees Awards Act be uniformly and fairly applied, and that the chilling effect of a decision such as at bar should be avoided, and the stringent requirement of bad faith be declared as the standard of awards to prevailing defendants. Also, it should be the rare case indeed that the denial of an award by a district court in the exercise of its discretion should be reversed on appeal.

Furthermore, the *de minimis* rule of the Tenth Circuit, which conflicts with the rule in other circuits, should be clearly and finally discarded and held inappropriate in civil rights cases. Quantitative measurement of the degree of seriousness of an invasion of individual civil rights has no place in our system.

Lastly, the equating of due process and the right to oral argument should be more clearly delineated by the Court, particularly when one party is denied the right to participate under the facts of this case.

It is respectfully requested that the Court issue the writ.

Respectfully submitted,

JOSEPH P. JENKINS

APPENDIX

APPENDIX A

Order of Court

THE COURT: All right, I'm going to grant summary judgment.

My reasoning is that under the facts as I understand them, and that's based really on the two depositions to which you made reference, the key to the case is whether or not the Defendant, Mr. Marcoux, came out to the Plaintiff's boat, operating on a lake, and subject to the requirements of Colorado law, for such an operation which included the requirement of having a registration, and the requirement of having adequate safety devices, which include the fire extinguisher, and the sounding device, whether, when Officer Marcoux came out to that boat then being operated by Mr. Prochaska, there was any requirement as a matter of law to have any probable cause to intrude on the Plaintiff's liberties to the extent that he did.

All that is shown here is that he comes alongside, that he pulls Mr. Prochaska's boat too, so that it's joined to that extent to the Defendant's boat, and then he proceeds to ask Mr. Prochaska a number of questions which include the question about the safety devices.

In my opinion there is no requirement for probable cause for that stop, and I'm not going to wait for the Supreme Court of the United States on that subject.

I draw a distinction between the 4th Amendment's protection of places which are entitled to privacy, the obvious being residences, places of business, and the like,

where there is no basis for the officers intruding into the zone of privacy.

But when you operate a boat on a lake, a motor vehicle on a public highway, matters of that type, you are in a public place, and you have an expectation whether you rely on implied consent, or whether you simply rely on a reasonable expectation, that you're going to be stopped, and asked questions by appropriate law enforcement personnel. It's there.

And I recognize that it hasn't been articulated in these specific terms by the Supreme Court of the United States at this point, but I'm entitled to interpret the Constitution as well as and as long as it is inconsistent with interpretations that are binding upon me, and it's my view of the 4th Amendment protection that it doesn't apply to the limited intrusion in this case where he didn't even go on board the boat, that he simply stopped him too, and said "Where are these devices," and the Plaintiff admits that he didn't have the devices. And therefore clearly admits a violation of State law.

Now following that through then, the law is, as I say, Marcoux didn't have to have probable cause to make the stop, stops within his lawful authority.

You follow through on that, it seems to me everything else falls in terms of there being any constitutional violation, because we knew of an admitted violation of the law.

I think Marcoux had a right to arrest Prochaska right there on the dock, if he didn't sign the consent to appear.

Now we follow through the appearance, I guess it was in the County Court, where the second charge was filed and dismissed almost simultaneously.

Well, here too, I think that the facts were that Marcoux had probable cause at that point to believe that the boat wasn't validly registered, and there was a basis for the charge.

Upon a showing that there was the temporary registration, he backed off, and I don't think there was a constitutional violation involved in that, beyond that.

I think the case would never get to a jury on qualified immunity, because the testimony of Marcoux in his deposition is that he went out there and stopped this particular boat, because he didn't see a registration.

But he also said in his deposition that his understanding of the law was he could go out there and stop him, whether he had failed to observe a registration, that both contacts were and still are being made routinely by him, just to check on the registration, and on the safety equipment.

And accordingly, it seems clear to me that he had a belief that he had this right. And I can't say that's an unreasonable belief, because that's where I come down on the law in the case, where he indeed had a right.

Now I want to emphasize that by my saying I'm not following the trivial or inconsequential line of cases, that by saying that I do not criticize the 10th Circuit and what it holds in that case.

I'm not holding my decision to grant summary judgment on that basis, because I don't know how one measures the significance of the 4th Amendment violation. I can't.

Here there is none in my judgment.

So upon these views, the Clerk will enter a judgment dismissing the complaint in this civil action, and awarding

to the Defendant his costs upon assigning of the bill of costs within ten days.

Court is in recess.

(WHEREUPON, the proceedings were recessed at 11:45 o'clock a.m.)

February 21, 1979

APPENDIX B

(Filed March 5, 1979)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 78 M 658

FRANK J. PROCHASKA,
Plaintiff,

v.

FRANCIS H. MARCOUX,
Defendant.

Order

Upon the finding that the above captioned action was not frivolous, unreasonable or without foundation, it is hereby

ORDERED that defendant's Motion For Attorneys Fees is denied.

Dated: March 5, 1979.

BY THE COURT:

/s/ Richard P. Matsch
Richard P. Matsch, Judge
United States District Court

APPENDIX C

(Filed September 9, 1980)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 79-1347 and 79-1348

FRANK J. PROCHASKA,
Plaintiff-Appellant Cross-Appellee,

v.

FRANCIS H. MARCOUX,
Defendant-Appellee Cross-Appellant.

Appeal From the United States District Court
For the District of Colorado
D.C. No. 78-M-658

Joseph P. Jenkins, Estes Park, Colorado, for Plaintiff-Appellant. (Excused from oral argument).

David R. Brougham of Yegge, Hall & Evans, Denver, Colorado, for Defendant-Appellee.

Before BARRETT, DOYLE and LOGAN, Circuit Judges.

BARRETT, Circuit Judge.

Frank J. Prochaska (Prochaska) appeals an order and judgment granting Francis Marcoux' (Marcoux) motion for summary judgment. Prochaska initiated the action on July 3, 1978 seeking compensatory and exemplary damages for Marcoux' alleged violation of his civil rights under

28 U.S.C.A. § 1983. A brief summary of the facts will facilitate our appellate disposition.

Marcoux is a wildlife conservation officer with the Colorado Division of Wildlife assigned to the Estes Park area of Colorado. Marcoux' duties as a wildlife officer include law enforcement, game management, fish management, and other duties related to management. As a wildlife conservation officer Marcoux is empowered, and obligated to request the production of hunting and fishing licenses (C.R.S. 1973, as amended, § 33-6-110). Marcoux is further empowered and obligated, as a wildlife conservation officer, to stop and board any boats and vessels (C.R.S. 1973, as amended, § 33-31-111) operating within the waters of Colorado, unless otherwise exempt, to ascertain if the boat or vessel is properly registered and properly equipped with safety equipment including sounding devices and fire extinguishers, in accordance with the laws of Colorado.

On June 28, 1976, Marcoux, while on routine patrol, observed Prochaska operating his boat on Lake Estes without a current 1976 registration sticker. Since Marcoux had been making his patrol in his four wheel drive pickup, and a patrol boat was not available, he borrowed a boat from a nearby marina operator to go on the lake to check Prochaska's registration, his fishing license, and safety gear.

Upon reaching Prochaska's boat, Marcoux checked his fishing license and safety equipment. In checking Prochaska's fishing license and his boat for safety equipment, Marcoux remained in his own boat, did not enter Prochaska's boat or search it, and only visually examined it. After determining that Prochaska had a valid fishing license but that he was operating his boat without a sounding device and fire extinguisher, in violation of the laws of Colorado, Marcoux told Prochaska that he would have to issue a citation for not having the proper safety equipment

in the boat and that Prochaska would have to accompany him back to the boat docks.

After returning to the dock, Marcoux cited Prochaska for "Operating a vessel without Proper Safety Equipment; To Wit, No Fire Extinguisher, No Sounding Device". Prochaska originally refused to sign the citation; however, he signed it after he was placed under arrest.

After Prochaska signed the citation, Marcoux inquired about the boat registration. Prochaska responded that he did have a temporary registration for the boat, and that although he did not have it with him, he would bring it with him to court when he was to appear for the safety violation charges set forth in the citation.

Prior to Prochaska's scheduled court appearance, Marcoux telephoned the boat division of the Division of Parks and Outdoor Recreation to determine if Prochaska's boat was properly registered. Upon being informed that the boat was not registered, Marcoux prepared a second citation charging Prochaska with operating a vessel without a proper registration.

On July 2, 1976, the date of Prochaska's scheduled court appearance, Marcoux approached Prochaska in the courthouse hallway and handed him the second citation he had prepared for operating a vessel without a proper registration. When Prochaska immediately produced a current, valid temporary registration, Marcoux went directly to the Assistant District Attorney who thereafter dismissed the charge in open court. Subsequent thereto, Prochaska proceeded to trial. He was convicted for operating a vessel in Colorado without proper and adequate safety equipment. His conviction was affirmed on appeal.

On July 3, 1978 Prochaska filed a civil rights action against Marcoux, alleging, *inter alia*: Marcoux's actions

in citing him for operating a vessel without proper safety equipment were undertaken maliciously and without probable cause; Marcoux' actions were accompanied by an abusive and arrogant manner; Marcoux' actions deprived him of his right to be secure against unreasonable searches and seizures, the right not to be deprived of life, liberty, or property without due process of law, and the right of an individual to be free from unreasonable interference by a police officer. Prochaska sought compensatory damages of $50,000 and punitive damages of $50,000.00.

In answer, Marcoux alleged that Prochaska had failed to state a claim cognizable under the civil rights act and that his actions were predicated on probable cause and undertaken in good faith.

Subsequent to depositions being taken by both parties, Marcoux filed a motion for summary judgment and memorandum in support thereof on January 2, 1979. On February 21, 1979, more than six weeks after Marcoux had filed his motion for summary judgment and supporting memorandum, and at a time when Prochaska had failed to either file a brief or affidavit in opposition to same, a hearing was held before the Court on Marcoux' motion for summary judgment. At the conclusion of the hearing, summary judgment was entered in favor of Marcoux, the complaint was dismissed, and costs of the action were assessed against Prochaska. Marcoux' subsequent motion for attorney fees was, however, denied.

On appeal Prochaska contends: (1) the Court erred in granting Marcoux' motion for summary judgment; (2) the stop and search of his motor boat was violative of the Fourth and Fourteenth Amendments; (3) there was not probable cause for charging him with operating a vessel without a proper and valid registration; and (4) his constitutional rights were violated under the proscriptions of the Civil Rights Act.

Marcoux cross-appeals the denial of his request for attorney fees.

Prochaska contends the Court erred in granting Marcoux' motion for summary judgment. Prochaska argues summary judgment was improper herein since "there are several questions of material fact that cannot be resolved on a motion for summary judgment, such as the veracity of Marcoux in attempting to justify his random stop—that he had called unknown persons attempting to check out the existence or non-existence of a temporary registration sticker . . . [and] . . . whether the officer acted in a reasonable manner by issuing a second citation without further information would be a question for the finder of fact". [Appellant's Brief at pp. 13-14].

On appeal from an order granting a motion for summary judgment, the record is reviewed in light most favorable to the opposing party. *Security National Bank v. Belleville Livestock Commission Co., Inc.*, 619 F.2d 840 (10th Cir. 1980). Where different ultimate inferences may properly be drawn, the case is not one for summary judgment, *Security National Bank, supra*, and questions of intent, which involve intangible factors including witness credibility, are matters for consideration of the fact finder after a full trial. *Buell Cabinet Company, Inc. v. Sudduth*, 608 F.2d 431 (10th Cir. 1979).

Parties like Prochaska, however, cannot rest on mere allegations or denials, but must, by affirmative response in affidavits or otherwise, set forth specific facts showing that there is a genuine issue for trial. *Security National Bank, supra.*

Applying these standards, we hold the Court properly granted Marcoux' motion for summary judgment. Nothing within Prochaska's deposition supported his allegation that Marcoux acted in an abusive and malicious manner

in derogation of his constitutional rights. Furthermore, nothing within Prochaska's deposition rebuts Marcoux' depositional assertions that he properly cited Prochaska for operating a vessel without proper safety equipment in violation of the laws of Colorado.

Prochaska's failure to oppose Marcoux' motion for summary judgment is not saved by his allegations on appeal that "several material questions of fact" remain unanswered relative to the veracity of Marcoux' justification of stopping Prochaska, and whether Marcoux acted in a reasonable manner in issuing a second citation. This is particularly true herein, inasmuch as: the record clearly establishes the lack of any additional questions of fact; Prochaska acknowledges that he did not have a current 1976 registration sticker on his boat when Marcoux approached him; and there was no fire extinguisher in his boat, constituting a violation of the laws of Colorado.

II.

Prochaska contends it is an unreasonable search and seizure under the Fourth and Fourteenth Amendments to stop a motor boat, being operated on a public lake, for the purpose of checking the existence of safety equipment, where there is neither probable cause to believe nor reasonable suspicion that the boat is being operated contrary to state laws relative thereto. In support of this contention, Prochaska relies on the recent Supreme Court decision of *Delaware v. Prouse*, 440 U.S. 648 (1979).

In *Delaware v. Prouse, supra*, the Court observed:

> The Fourth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of those Amendments, even though the purpose of the stop is limited and the resulting deten-

> tion quite brief. *United States v. Martinez-Fuerte*, 428 U. S. 543, 556-558 (1976); *United States v. Brignoni-Ponce*, 422 U. S. 873, 878 (1975); cf. *Terry v. Ohio*, 392 U. S. 1, 16 (1968). The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of "reasonableness" upon the exercise of discretion by government officials, including law enforcement agents, in order " 'to safeguard the privacy and security of individuals against arbitrary invasions. . . .' " *Marshall v. Barlow's, Inc.*, 436 U. S. 307, 312 (1978), quoting *Camara v. Municipal Court*, 387 U. S. 523, 528 (1967). Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against "an objective standard," whether this be probable cause or a less stringent test. [Footnotes omitted].
>
> 440 U.S. at pp. 653-654.

Under *Delaware v. Prouse*, *supra*, the stopping of an automobile and the detention of its occupants, constituting a seizure, is proper and considered reasonable if there is an articulable and reasonable suspicion that either the motorist is unlicensed or the vehicle unregistered, or that either the vehicle or occupant is otherwise subject to seizure for violating the law.

Applying *Delaware v. Prouse*, *supra*, to the instant case, it is clear that Marcoux had "articulable and reasonable suspicion" to believe that Prochaska's boat was not properly registered when he did not see a current Colorado registration sticker affixed to the boat. Thus, Marcoux

was not only empowered but obligated to question Prochaska. Marcoux' deposition was unrebutted in that: he observed Prochaska's boat on Lake Estes during the course of his routine patrol as a Colorado Wildlife Conservation Officer with the Colorado Division of Wildlife; he observed Prochaska fishing on Lake Estes in a boat that did not have a 1976 registration sticker on it; he thereafter went out on the lake for the specific purpose of checking the boat registration; and after making boat contact he routinely inquired of Prochaska and checked his boat for fishing licenses and safety gear. Under these circumstances, we cannot accept Prochaska's assertion that Marcoux' search and seizure was unreasonable under the Fourth and Fourteenth Amendments.

It may very well be true, as Prochaska argues, that it is unlawful "to stop a motor boat, being operated on a public lake, for the purpose of checking the equipment where there is neither probable cause to believe nor reasonable suspicion that the boat is being operated contrary to state laws governing the operation of motor boats". This argument, however, rings hollow when measured against the facts presented by this record: Marcoux observed a boat on Lake Estes without a current 1976 registration sticker; he went onto the lake to check the registration and to effectuate a "boat contact" which routinely included checking for fishing licenses and safety gear, and is considered "an all-encompassing contact". In so doing, Marcoux was clearly acting in accordance with the laws of Colorado under which "Every wildlife officer . . . shall have the authority to enforce the provisions of this article and in the exercise thereof shall have the authority to stop and board any vessel subject to the provisions of this article." C.R.S. 1973, as amended § 33-31-112.

Marcoux' actions were therefore in accord with the laws of Colorado and not violative of Prochaska's Fourth

Amendment rights. As the Court recently observed in *United States v. Mendenhall*, ... U.S. ..... (May 27, 1980):

> The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary and oppressive interferences by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U. S. 543, 554.
>
> * * *
>
> Moreover, characterizing every street encounter between a citizen and the police as a "seizure," while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices. The Court has on other occasions referred to the acknowledged need for police questioning as a tool in the effective enforcement of the criminal laws. "Without such investigaton, those who were innocent might be falsely accused, and those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished. *Haynes v. Washington*, 373 U. S. 503, 515." *Schneckloth v. Bustamonte, supra*, at 225.

Slip op. at pp. 8-9.

III.

Prochaska contends that Marcoux lacked probable cause for charging him with operating a vessel without a proper and valid registration. This contention is frivolous.

Prochaska admits in his brief that he was operating his boat on Lake Estes without a current 1976 registration

sticker. It is also uncontested that after issuing Prochaska a citaton, Marcoux was told by the Denver Office of the Parks and Recreation Boat Registration Department that it had no record of the number obtained from Prochaska's boat and that a cross-check of Prochaska's name showed that no boat was registered to him. Thus, the fact that Marcoux thereafter prepared a second citation charging Prochaska with operating a boat without a proper and valid registration, is of no moment, when, as here, Marcoux promptly caused to have the citation dismissed after Prochaska displayed a temporary registraton which apparently had not been recorded by the Boat Registration Department. Under these circumstances, we cannot hold that Marcoux lacked probable cause to charge Prochaska with operating a vessel without a proper and valid registration. Furthermore, in our view, the expedient manner in which Marcoux proceeded to cause the citation to be dismissed after Prochaska displayed the temporary registration to him, defies the interpretation of any maliciousness or bad faith by Marcoux in his issuance of the second citation. Marcoux' actions did not give rise to a claim cognizable under 42 U.S.C.A. § 1983.

IV.

Marcoux contends in his cross-appeal that the trial court improperly denied his motion for attorney fees, requested "pursuant to 42 U.S.C. § 1988 and the Order of this Court".

In denying Marcoux' motion the Court ruled:

> Upon the finding that the above captioned action was not frivolous, unreasonable or without foundation, it is hereby

ORDERED that defendant's Motion For Attorney's Fees is denied.

[R., Vol. I, at p. 18].

We recently considered the propriety of awarding attorney fees to a defendant in a civil rights action. In *Charles W. Morgan III and Leslie Karen Morgan v. Brittany Apartments and Parceners, Ltd.*, No. 79-1230 (Unpublished, February 22, 1980), we observed "that the applicable standard in ascertaining whether a fee should be awarded to a *defendant* . . . depends on whether the action is clearly frivolous, vexatious or brought for harassment purposes." [Sl. op. at p. 5]. We there cited to *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978) for the proposition that a district court may, in its discretion, award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was "frivolous, unreasonable, or without foundation." We opined and concluded in *Morgan v. Brittany, supra*, that the District Court "made no effort to determine whether the lawsuit was frivolous, unreasonable or without foundation". Thus, we vacated the award of attorney fees to the defendant and remanded the case for further consideration in accordance with *Christiansburg, supra.*

The instant case is, in our view, clearly distinguishable from *Morgan v. Brittany, supra*, where the District Court failed to apply the *Christiansburg, supra*, standard. In the case at bar, we conclude that the District Court erred in finding that Prochaska's action was not "frivolous, unreasonable or without foundation", under the *Christiansburg* standard.

In *Christiansburg, supra*, the Supreme Court, in addressing the applicable standard, observed:

> To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII. Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so. And, needless to say, if a plaintiff is found to have brought or continued such a claim in *bad faith*, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense.
>
> 434 U. S. at p. 422.

This standard was recently reiterated in *Roadway Express, Inc. v. Equal Employment Opportunity Commission*, ... U. S. ..... (June 23, 1980) in which the Court stated:

> Prevailing plaintiffs in civil rights cases win fee awards unless "special circumstances would render such an award unjust," *Newman v. Piggie Park Enterprises*, 390 U. S. 400, 402 (1968) (*per curiam*), but a prevailing defendant may be awarded counsel fees only when the plaintiff's underlying claim is "frivolous, unreasonable, or groundless." *Christiansburg Garment Co. v. EEOC*, 434 U. S. 412, 422 (1978).
>
> Sl. op. at p. 9.

Applying this standard to the facts herein we hold that Prochaska's claim was clearly "frivolous, unreasonable or groundless". Marcoux' unrebutted testimony is that he checked out Prochaska's boat because it did not have a current 1976 registration sticker, and that in conjunction

with the "boat contact" he routinely checked for fishing licenses and boat safety gear. Thereafter Prochaska went to trial and was convicted of violating Colorado's boating safety laws. This conviction was affirmed, after which Prochaska initiated this civil rights action against Marcoux for allegedly violating his constitutional rights.

Prochaska's complaint alleges that Marcoux' actions were performed "knowingly, intentionally, and maliciously, in utter and callous disregard of the rights of plaintiff [Prochaska]." Prochaska's deposition, however, fails to establish or reinforce these allegations. On the contrary, Prochaska, within his deposition, acknowledged that he did not have a fire extinguisher or sounding device in his boat when Marcoux approached and that he was aware that under the laws of Colorado he was required to have such equipment. Prochaska also acknowledged that Marcoux did not actually enter his boat and that "All I know is that he was trying to determine whether I had those pieces of equipment [safety]".

Affirmed as to Prochaska.

Reversed and Remanded as to Marcoux for the calculation and award of attorney fees.

Judge Doyle, Concurring in part and dissenting in part.

I concur in the affirmance of the trial court's judgment in favor of the defendant-appellee in the case in chief. In concurring I note that the plaintiff's case is not the strongest ever to come to my attention. On the other hand, it is not the weakest. One problem from which it suffers is that the basic set of facts constitutes a lot of ado about nothing.

It was basically of little moment. It is not designed to stir up the sympathy or compassion of any court. A little common sense on the part of the officer and on

the part of the plaintiff could have solved it. Perhaps the factor which produced it was the apparent belief of the plaintiff that the officer and Harris, the operator of the Marina were in cahoots. We will never know for sure whether this was the case but the evidence points in the direction of their not being in a conspiracy against the plaintiff. So it likely started on a misconception. Another problem was the filing by the officer of a second charge and doing so without checking out the registration. Even if this was a good faith mistake, it started the trouble.

The trial court found and determined that the defendant appellee was not entitled to an attorney's fee; that the action of plaintiff was not frivolous, unreasonable, or without foundation. This is a matter which is properly for the trial court to determine. For this court to refind the facts and reverse on the ground that the cause was frivolous calls for the application of a plain error standard. This was not the condition. (With all respect to my brother.)

The law is not obscure. Christianburg Garment Co. v. EEOC. 432 U. S. 412. That together with Newman v. Piggie Park Enterprises, 390 U. S. 400 set down the governing law and demonstrated the vast difference between an award of fees to a plaintiff and an award to a defendant. If the majority were to follow the teachings of these cases we would be unanimous in our judgment. But, the majority opinion is even out of harmony with the decision of this court in E.E.O.C. v. Fruehauf Corporation, 609 F. 2d 434.[1] It would also undermine this

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1. In that Title VII case this court said: "There is nothing in the record * * * before us to support the trial court's finding that the action was frivolous from its inception, or that EEOC was motivated by something other than good faith, presumably bad faith. Cottrell v. Newspaper Agency Corporation, 590 F. 2d 836, 839 (10th Cir. 1979).

court's decision in Morgan v. Brittany Apartments and Parceners, Ltd. No. 79-1230 (unpublished to date, but due to be published immediately).

There is reason to believe that the case before us is a first in the matter of award of a fee to a plaintiff. Surely if there were even one authority favoring the stand taken, it would be cited. Judge Barrett would have discovered it. I am not one to object to pioneering. It is the particular effort that bothers me. If a case is to be considered frivolous based on the length of the chancellor's foot, so to speak, the results are going to be unfortunate.

APPENDIX D

September Term — November 10, 1980
Nos. 79-1347 and 79-1348

FRANK J. PROCHASKA
Plaintiff-Appellant Cross-Appellee,

vs.

FRANCIS H. MARCOUX,
Defendant-Appellee Cross-Appellant.

This matter comes on for consideration of appellant's-cross appellee's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the cases were argued and submitted.

The petition for rehearing having been denied by the panel to whom the cases were argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Howard K. Phillips
Howard K. Phillips, Clerk

APPENDIX E

Rules of Court

10 (e) In the interest of expediting final disposition of pending cases, the chief judge may designate panels of three judges to review pending cases at any time prior to oral argument and submission to determine whether oral argument is needed.

Oral argument will be allowed in all cases unless a panel of three judges, after examination of the briefs and records, shall be unanimously of the opinion that oral argument is not needed. The panels will utilize criteria which will allow oral argument unless they conclude the appeal is (1) frivolous; or (2) the dispositive issue or set of issues has been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

In aid of the disposition of pending cases under these rules, any party in an original proceeding, an agency proceeding, or an appeal, may include in his brief or memorandum his application, petition, or motion made under 10th Cir. R. 9(a), or in his answer to any of these, a statement setting forth reasons why, in his opinion, oral argument should be heard. If all of the judges of the panel to which an original proceeding, an agency proceeding, or a pending appeal, has been referred conclude that one or more of the criteria have been met, they may make an appropriate disposition, without oral argument, including denial, dismissal, affirmance, or reversal.

In cases assigned to the A or B calendar, if counsel believes oral argument will not help the court in deciding the case, he should file as soon as possible after the filing of the appellee's brief, a motion to submit the case on the briefs. The decision of whether oral argument shall be heard will be made by the court.

APPENDIX F

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 79-1347
No. 79-1348

FRANK J. PROCHASKA,
Appellant,

vs.

FRANCIS H. MARCOUX,
Appellee.

Appeal from the United States District Court for
the District of Colorado

Affidavit

STATE OF COLORADO)
) ss.
COUNTY OF LARIMER)

Joseph S. Payne, of lawful age, being first duly sworn upon his oath, deposes and states as follows:

1. Affiant is an attorney at law and an office associate of Joseph P. Jenkins, counsel for the Appellant in the within cause.

2. On July 7, 1980, Mr. Jenkins was in Chicago, Illinois, due to the sudden death of his mother, taking care of funeral arrangements and her business affairs as her oldest child.

3. On July 7, 1980, Affiant received a telephone call from Mr. Jenkins advising that he could not return from Chicago in time for the oral argument set in this cause for Tuesday, July 8, 1980. Mr. Jenkins requested that

Affiant immediately notify the court so that the case could be put over for argument at a later date.

4. On Monday, July 7, 1980, at sometime during the morning hours, Affiant spoke with Mr. Phillips, the Clerk of the Court, and advised him of Mr. Jenkins's emergency. Affiant told Mr. Phillips that Mr. Jenkins requested that the case be put over for argument at a later date. At no time did Affiant tell Mr. Phillips that Mr. Jenkins was requesting a waiver of oral argument or to be excused therefrom. At no time did Mr. Jenkins tell this Affiant that he intended to waive oral argument or to be excused from arguing.

5. Affiant cannot account for the fact that the argument went ahead on Tuesday, July 8, 1980, in spite of the fact that Mr. Jenkins had been confronted with a dire and immediate emergency.

6. Affiant has known Mr. Jenkins for over thirty years, and has never known him to miss an oral argument or waive oral argument except in one simple case in the Colorado Court of Appeals.

7. Affiant is of the opinion that there was a lack of communication between him and Mr. Phillips, and that Mr. Jenkins should be given his opportunity to argue this cause.

Further Affiant saith not.

/s/ Joseph S. Payne
Joseph S. Payne, Affiant

Subscribed and sworn to before me this 7th day of October, 1980.

/s/ Nancy M. Jenkins
Notary Public

My commission expires: June 3, 1974.